

***United States Court of Appeals  
for the Second Circuit***



**RESPONDENT'S  
BRIEF**





NO. 76-4165

IN THE UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

No. 76-4165

STATE INSURANCE FUND

and

GUARDINO & SONS

Petitioners

v.

CATHERINE PESCE

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS

Respondents

ON PETITION FOR REVIEW OF AN ORDER  
OF THE BENEFITS REVIEW BOARD

BRIEF FOR RESPONDENT, DIRECTOR,  
OFFICE OF WORKERS' COMPENSATION PROGRAM

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## COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

- I. Whether the claimant's claim for death benefits under the Longshoremen's and Harbor Workers' Compensation Act is governed by the law in effect on the date of the employee's death.
- II. Whether amended section 9 of the Longshoremen's Act is violative of the Constitution.

## COUNTERSTATEMENT OF THE CASE

This is a proceeding for the review of a final order of the Benefits Review Board in the claim entitled Pesce v. Guardino & Sons et al., 4 BRBS 36, BRB No. 75-303 (1976), pursuant to section 21(c) of the Longshoremen's and Harbor Workers' Compensation Act,<sup>1/</sup> as amended, 33 U.S.C. § 921(c) (Supp. V, 1975).

Catherine Pesce, widow of Matteo Pesce, filed a claim for death benefits pursuant to section 9 of the amended Act, 33 U.S.C. 909 (Supp. V, 1975). The claimant predicated this claim upon a 1972 Amendment<sup>2/</sup> to section 9 and alleged that

<sup>1/</sup> Act of March 4, 1927, c. 509, 44 Stat. 1424, as amended, 33 U.S.C. § 901 et seq.

<sup>2/</sup> Section 5(d) of the Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972, Pub. L. 92-576, 86 Stat. 1251, 1253.



this amendment, which became effective prior to her husband's death, was applicable because the law in effect at death governs the right and liability for death benefits under the Act. The employer and its compensation insurance carrier controverted this claim.<sup>3/</sup>

This claim was referred to the Office of the Chief Administrative Law Judge, United States Department of Labor, for adjudication pursuant to section 19(d) of the Act, 33 U.S.C. § 919(d) (Supp. V, 1975). All parties in interest agreed to waive their right to personally appear before the administrative law judge because the relevant facts were not in dispute and the resolution of this claim was solely a question of law. Accordingly, pursuant to 20 CFR § 702.345 (1975), the parties submitted an agreed Stipulation of Facts and briefs on the legal issue (App. 6a). The administrative law judge issued a compensation order awarding death benefits in favor of the claimant; the administrative law judge concluded that the law in effect on the date of the decedent's death governed this claim (App. 8a-13a).

The employer filed a timely appeal with the Benefits Review Board pursuant to section 21(b) of the Act, 33 U.S.C. § 921(b) (Supp. V, 1975). By decision filed on May 28, 1976, the Board unanimously affirmed the decision of the administrative law judge. (App. 2a-5a).

<sup>3/</sup> The employer and carrier will hereinafter be jointly referred to as the employer.



The employer seeks reversal of the Board's order.

#### COUNTERSTATEMENT OF THE FACTS

On July 20, 1961, Matteo Pesce, now deceased, sustained an injury which arose out of and in the course of his employment. As the parties have stipulated, this disabling injury was compensable pursuant to the provisions of the Longshoremen's Act. Moreover, as further stipulated, Mr. Pesce never returned to any gainful employment and a compensation order, awarding compensation for a permanent total disability, was issued and remained in effect until his death on October 14, 1973. Although the Stipulation of Facts does not expressly state that death was from causes unrelated to the employment injury, the administrative law judge made such a finding based upon the representation of all of the parties in their briefs and said finding has never been questioned nor is it in dispute (App. 11a).

#### ARGUMENT

##### I

DEATH BENEFITS UNDER THE LONGSHOREMEN'S ACT  
ARE GOVERNED BY THE LAW IN EFFECT AT DEATH  
AND THUS THE INSTANT CLAIM IS COMPENSABLE  
PURSUANT TO THE 1972 AMENDMENTS TO THE ACT.

Between the date of the decedent's compensable injury and his death, Congress substantially amended the Longshoremen's Act. The amendment relevant to this proceeding provides:

If the injury causes death, or if the employee who sustains permanent total disability due to the injury thereafter dies from causes other than the injury, the compensation shall be known as a death benefit and shall be payable in the amount and to or for the benefit of the persons following:

\*

\*

\*

Amendments, § 5(d), 86 Stat. 1251, 1253, 33 U.S.C. § 909 (Supp. V, 1975) (emphasis supplied).

Section 22 of the Amendments, 86 Stat. 1251, 1265, further provides:

The amendments made by this Act shall become effective thirty days after the date of enactment of this Act.

The Amendments were enacted on October 27, 1972 and became effective on November 26, 1972. The decedent herein died one year after the effective date of the 1972 Amendments and at the time of death, he was permanently totally disabled as a result of the compensable employment injury.

A law is not retroactive merely because a part of the factual situation to which it is applied occurred prior to its enactment. Rather, a law may be retroactive only when it operates upon rights which have been acquired or upon obligations which have existed prior to its passage. Cox v. Hart, 260 U.S. 427 (1922); Cohen v. Beneficial Loan Corp., 337 U.S. 541 (1948).



In cases arising under the Longshoremen's Act it has been uniformly held that the right to death benefits is separate and distinct from the right to disability benefits and that this separate right does not exist or come into being until the event of death. In International Mercantile Marine Co. v. Lowe, 93 F.2d 663 (2d Cir.); cert. denied, 304 U.S. 565 (1938), this Court held:

[D]isability benefits fixed by section 8 of the Act and the right of the widow to death benefits under section 9 are different. They have different claimants thereto; one arising in the event of injury not resulting in death and the other arising only in the event of death. They are separately provided for by separate sections of the act and accrue on different bases.

\* \* \* \* \*

The separation of the awards in the statute indicates that Congress intended this purpose.

\* \* \* \* \*

When death occurs, a new cause of action arises \* \* \*

93 F.2d at 663, 664  
(emphasis supplied).

Accord, Hitt v. Cardillo, 131 F.2d 233 (D.C. Cir.), cert. denied, 318 U.S. 770 (1940); Norton v. Travelers Insurance Co., 105 F.2d 122 (3rd Cir. 1939).

Likewise, in Hampton Roads Stevedoring Corp. v. O'Hearne, 184 F.2d 76 (4th Cir. 1950), the court, recognizing that the right to death benefits is separate and distinct, upheld the



applicability of a 1948 Amendment<sup>4/</sup> to section 9 which became effective after the compensable injury but before the employee's death. The court concluded that the law in effect when death occurs governs the rights and liabilities of the parties. And, the court further held the application of that intervening amendment prospective, not retrospective, because the death occurred after the effective date of the amendments. Accord, Travelers Insurance Co. v. Toner, 190 F.2d 30 (D.C. Cir.), cert. denied, 342 U.S. 826 (1951); Penn Jersey Welding Co. v. Lowe, 183 F.2d 936 (3rd Cir. 1950); Brown-Pacific-Maxon Co. v. Cardillo, 91 F. Supp. 968 (S.D.N.Y. 1950).

The employer, however, suggests that these prior consistent holdings are inapplicable. The employer avers that there is a distinction between applying an increase in the amount of death benefits and a change in the statutory conditions for entitlement to death benefits.

<sup>4/</sup> In O'Hearne, the employee sustained a compensable injury on June 15, 1948 and died on July 17, 1948. Between the date of injury and the date of death, the Act of June 24, 1948, c.623, 62 Stat. 602, became effective. This Act increased the allowable funeral expenses, increased the benefits to children of the deceased employee, increased the benefits payable to orphaned children of the deceased employee, and deleted the statutory maximum payable in death cases.



This alleged distinction is premised on the assumption that an employer has a right to the continuation of the requirement of a causal relationship as the sole condition for entitlement to death benefits.

There is no vested interest in or right to rules of law remaining unchanged, Arizona Cooper Co. v. Hammer, 250 U.S. 400, 420 (1919), and the alleged novelty of a law is not a constitutional objection. Hammer, supra at 419. Nor is there any right to the continuation of the concept that death benefits are payable under a workers' compensation statute only when there is proof of a causal relationship between death and injury.

In Norfolk, Baltimore and Carolina Lines, Inc. v. Director, Office of Workers' Compensation Programs, 539 F.2d 378 (4th Cir. 1976), reh. denied, September 17, 1976, the court rejected a similar challenge to the application and constitutionality of amended section 9 in a case factually identical to the instant one. In affirming the decision of the Benefits Review Board, the court unequivocally agreed that the 1972 Amendment to section 9 was applicable to a post-amendment death, regardless of the date of the employment injury.

Moreover, the result in O'Hearne, supra, and Norfolk, Baltimore and Carolina Lines, Inc., represent the majority

rule in cases arising under state compensation statutes. and this result has been equally applied when the intervening amendment alters the conditions of entitlement to death benefits to the detriment of statutory survivors.

In Schwartz v. Talmo, 205 N.W. 2d 318 (Minn. 1973), appeal dismissed, 414 U.S. 803 (1973), the employee sustained a compensable injury and received disability compensation for two years. Subsequently, the employee committed suicide which was held to have been the direct and proximate result of his prior employment injury.

However, death benefits were denied to the widow because prior to the death an amendment to the state compensation statute expressly precluded death benefits in the event of suicide. In affirming this denial of death benefits, the court rejected the widow's assertion that the court's prior decisions<sup>5/</sup> were distinguishable on the ground that they governed the quantum of payments and not the conditions of entitlement. And, the court further rejected the assertion that the new condition for entitlement to death benefits was retrospective and destructive of a vested right:

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<sup>5/</sup> See, e.g., Carroll v. State, 68 N.W. 2d 166 (Minn. 1954).



However, this argument is based on the assumption that there was an existing right under the laws of the State of Minnesota, and as stated above, we have consistently held that all rights of the dependents are fixed as of the date of death. Therefore, there can be no destruction of rights since none existed at the time of the passage of the statute.

205 N.W. 2d at 322.

Likewise, in Emmons v. Keller, 254 N.E. 2d 687 (Ohio 1970), the employee was injured in 1962 and died in 1965. However, a 1963 amendment to the state compensation statute eliminated the statutory provision which would have enabled his widow to sustain a claim for death benefits. The court upheld the applicability of this intervening amendment and denied death benefits. Citing to its own prior decisions,<sup>6/</sup> the court reaffirmed the principle that the law in effect<sup>6a/</sup> at death governs all rights to and liability for death benefits.

That amended section 9 of the Act, 33 U.S.C. § 909, was intended to apply to cases such as the instant one, is further supported by section 22 of the Amendments, 86 Stat. 1251, 1263, which provides that the Amendments are effective 30 days after enactment. Unlike prior amendments to the Act, section 22 does not restrict or limit the amended provisions to post-enactment injuries or death. Compare, Act of June 24,

<sup>6/</sup> E.g., State ex rel Jones & Laughlin Steel Corp. v. Dickerson, 115 N.E. 2d 833 (Ohio 1953).

<sup>6a/</sup> It is significant to note that the Ohio State Constitution, unlike the Federal Constitution, expressly prohibits the state legislature from enacting retroactive laws. The court in Emmons recognized this constitutional prohibition but concluded that this provision had not been violated because the claimant-widow had no vested right prior to her husband's death. 254 N.E. 2d at 691.



1948, c.623, § 62 Stat. 602. Indeed, the lack of such a restriction in the several bills proposing to amend the Act in 1972 did not pass unnoticed.

On May 24, 1972, in the course of hearings before the Subcommittee on Labor of the Senate Committee, Mr. Edward D. Vickery, testifying on behalf of the maritime industry,<sup>7/</sup> stated with respect to section 15 of S.2318 (the effective date provision):

Obviously, S.2318 needs to be amended to provide that the amendments relate only to injuries sustained after the effective date and only to deaths resulting from such injuries sustained after the effective date of the Amendments.

Senate Hearings, supra  
n.7, at 350 (emphasis  
supplied). <sup>8/</sup>

On July 18, 1972, Mr. Vickery again testified in the same capacity and to the same effect regarding the identical provision of section 16 of H.R. 12006.<sup>9/</sup>

7/ See Hearings before the Subcommittee on Labor of the Committee on Labor and Public Welfare, U.S. Senate, 92d Cong., 2d Sess. on S.2318, S.525 and S.1547 at 314 (1972).

8/ It should be noted that at the time of Mr. Vickery's testimony, neither S.2318 nor H.R. 12006 proposed to amend section 9 in the manner that was subsequently enacted by Congress.

9/ Hearings before the Select Subcomm. on Labor of the Comm. on Education and Labor, House of Representatives, 92d Cong., 2d Sess. on H.R. 247, H.R. 3505, H.R. 12006, and H.R. 15023 at 115, 131-32 (1972).



This suggested restriction on the applicability of the proposed amendments, particularly in death cases, to those in which both the compensable injury and death occur after the effective date is clearly in response to the reasoning of the court in O'Hearne, supra. In O'Hearne, the 1948 Amendments were restricted to "injuries or deaths occurring on or after the effective date \* \* \*." See Act of June 24, 1948, c.623, § 6, 62 Stat. 602. The court concluded that "injury or death" were not synonymous and that the amendment therein was applicable to a death occurring after the effective date.

When the Senate committee favorably reported S.2318, with substantial amendments, on September 13, 1972, the change in its "effective date" provision requested by Mr. Vickery on behalf of the industry was not a part of the bill; the Senate passed it, as reported, the following day. 118 Cong. Rec. 30397, 30670, 30674. And, the House committee also reported H.R. 12006 favorably, which was very similar to that already passed in the Senate, and did not include the suggested change. This bill became Pub. L. <sup>10/</sup>92-576.

<sup>10/</sup> Technically, S.2318 became law; but the House, before passing the bill as it had been sent from the Senate, amended it by substituting the provisions of H.R. 12006, as reported, as a whole (118 Cong. Rec. 36376, 36389, 36390, 36395); and the Senate concurred in the amendment (118 Cong. Rec. 36265, 36274).



Thus, the 1972 Amendments were enacted without a general provision restricting its applicability to post-amendment injuries or deaths. Moreover, the statutory language and the legislative history only reveal a congressional intent to restrict the application of four of the amended provisions. Section 20(c)(3) of the Amendments, 86 Stat. 1251, 1263, deleted the requirement that widowers must prove prior dependency, a condition which was not required in the claims of widows; this amendment was limited to deaths or injuries occurring after the effective date. See also, S. Rep. 92-1125, 92d Cong., 2d Sess. 16. And, in Addison v. Bulk Food Carriers, Inc., 489 F.2d 1041 (1st Cir. 1974), the court held that Congress expressed an intent to restrict the legislative repeal of suits for unseaworthiness to post-amendment injuries. Likewise, the legislative history reveals an intent to limit the amended Act's extension to cover certain shoreside injuries to those sustained after the effective date. See S. Rep. 92-1125, 92d Cong., 2d Sess. 16. Finally, it appears that Congress intended to limit an employer's liability for the increased rate of compensation to post-amendment injuries or deaths by the specific inclusion of sections 10(h)(1),(3), 33 U.S.C. § 910(h)(1),(3), which increase compensation for certain pre-amendment injuries but with the additional compensation being paid from appropriations and by the Special Fund. See 33 U.S.C. § 910(h)(2).



The passage of the Amendments then, without a general restriction to future employment injuries, contrary to past practices, and without restricting the proposed changes in death benefits to cases in which both the injury and death occurred after the effective date, cannot be regarded as anything other than an intentional legislative act. Cf. Bradley v. School Board of City of Richmond, 416 U.S. 696 (1974), wherein the Court upheld the applicability of section 718 of the Emergency School Aid Act, <sup>11/</sup> 20 U.S.C. § 1617, which authorized the assessment of an attorney's fee in school desegregation cases, in a case which arose long prior to passage of the Act and for services rendered prior to the Act's effective date. In so holding, the Court noted that a proposed restriction on the attorney-fee provision to services rendered after the effective date had been rejected, and that

Thus, while there is no explicit statement that § 718 may be applied to services rendered prior to enactment, we are reluctant specifically to read into the statute the very fee limitation that Congress eliminated.

416 U.S. at 716, n.23.

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<sup>11/</sup> Passed as Title VII of the Education Amendments of 1972, Pub. L. 92-318, 86 Stat. 235, 354, 369.

Finally the employer's suggestion that Congress must not have intended the application of amended section 9 to a case such as the instant one, because Congress did not amend the definition of "death"<sup>12/</sup> nor did it amend the Act's coverage provision<sup>13/</sup> to reflect the amendment to section 9, is without merit.

The omission of these changes is no argument against the applicability of amended section 9 herein. In fact, the only possible argument is that there appears to be an inconsistency between amended section 9 and those two other provisions, regardless of when the permanently totally disabling injury and death occurred. However, it is a well known canon of statutory construction that Congress does not act in a vacuum nor are its Acts to be considered useless. And, an amendment to an existing statute is an indication of a

12/ 33 U.S.C. § 902(11), provides:

Death as a basis for a right to compensation means only death resulting from an injury.

13/ 33 U.S.C. § 903(a), provides:

Compensation shall be payable under this Act in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel) \* \* \*.



legislative intent to change existing law. In Re Bennett, 338 F.2d 479 (9th Cir. 1964).

Amended section 9 clearly sets forth alternative grounds for entitlement to a compensation "known as a death benefit." These alternative conditions are unambiguous and resort to the provisions cited to by the employer is unnecessary; they do not aid in the interpretation or application of section 9 but rather create the seeming inconsistency. In Lawson v Suwanee Fruit & Steamship Co., 336 U.S. 198 (1949), the Supreme Court refused to apply, for example, a statutory definition on the ground that its mechanical application would defeat the legislative intent contained in another provision. Likewise, in Norfolk, Baltimore and Carolina Lines, Inc., supra., the court stated:

Despite the possible incongruities charged to the Act as amended in 1972, the intention of Congress in its amendment of § 909 of 33 U.S.C. remains altogether clear and intelligible. Predominantly stamped upon the amendment throughout is its purpose: to enlarge the recompense provided to the survivors of a longshoreman dying after suffering a permanent and total disability.

539 F.2d at 380.

We submit, therefore, that the application of amended section 9 herein, is fully consistent with prior decisions and legislative intent.

## II

### THE 1972 AMENDMENT TO SECTION 9 OF THE ACT IS CONSTITUTIONAL.

The 1972 Amendment to section 9 of the Act, which adds a new condition for entitlement to death benefits, is not violative of the Constitution. In Williamson v. Lee Optical Co., 348 U.S. 483 (1954), the Court refused to strike down legislation regulatory of business on the ground that it may be unwise, improvident, or out of harmony with a particular school of thought. Indeed, the Court has refused to strike down workers' compensation statutes on the ground that such legislation was contrary to the traditional notion of liability based on fault. See, e.g., Arizona Cooper Co. v. Hammer, 250 U.S. 400 (1919). As the Court in Williamson, supra, noted, "It is enough that there is an evil at hand for correction and that it might be thought that the legislative measure was a rational way to correct it." 348 U.S. at 488.

The Longshoremen's Act is, of course, a compensation system not based on fault. It is a system designed to compensate for the losses occasioned by an employment injury. And, the Act was designed not only for the benefit of the injured employee but also for the benefit of statutory survivors, that is those generally dependent upon the injured employee.



Prior to the 1972 Amendments, the statutory survivors could only avail themselves of the Act's benefits if there were evidence of a causal relationship between the death and the injury. That requirement, however, does not preclude Congress from enacting another and different condition of entitlement, if it is reasonably consonant with the Act's purpose.

The claimant's cause of action is not, as suggested by the employer, predicated on the pre-amendment injury, nor is it totally disassociated from the employment. Rather, amended section 9 expressly requires three conditions: the existence of a compensable injury, resulting permanent total disability, and death during the continuation of such a disability. The permanent total disability does not sever the nexus upon which Congress' initial authority was predicated. Indeed, it is the continuation of the employment related disability which supports Congress' continuing jurisdiction; Congress has the authority to define the substantial rights once there has been a compensable injury. Crowell v. Benson, 285 U.S. 22 (1932).

In Norfolk, Baltimore and Carolina Lines, Inc. v. Director, supra., the court rejected the assertions that amended section 9 violated either the admiralty clause of the Constitution or the due process clause. The court held:

To the contrary, we think the beneficences of the amendment are maritime in nature since they are in furtherance of the purpose of the Act, and at this date the constitutionality of the Longshoremen's Act is beyond debate. Crowell v. Benson, 285 U.S. 22 (1932). The evident and outstanding wish of Congress was to assure indemnification of survivors of the inshore worker who had become utterly disabled in his work for the rest of his life.

Death benefits were included in the Act before the 1972 amendment, so that it did not introduce a novel or radical concept. This court has unequivocally insisted that they may constitutionally be increased after the injury and before death. Hampton Roads Stevedoring Corp. v. O'Hearne, *supra*, 184 F.2d 76, 78 (4th Cir. 1950). That is precisely the immediate situation; the 1972 amendment enlarged those benefits in that interval.

Furthermore, contrary to appellant's advocacy, there was no constitutional inhibition on Congress to expand the causal clause of the original Act. This is true notwithstanding the employer and the insurer may have believed they had contractual rights in the limitation of benefits called for by the Act when, prior to 1972, they assumed these obligations. The amendment cannot be voided on the ground that it constituted an impairment of contracts, for the constitutional bar to such impairment is directed only to the States. Article, I, Section 10.

Nor is the amendment an ordaining by Congress of a responsibility without due process. In Fleming v. Rhodes, 331 U.S. 100, 107 (1947), the Court met this contention head-on:

'Federal regulation of future action based upon rights previously acquired by the person regulated is not prohibited by the Constitution. So long as the Constitution authorizes the subsequently enacted legislation, the fact that its provisions limit or interfere with previously acquired rights does not condemn it. Immunity from federal regulation is not gained through forehanded contracts'.

539 F.2d at 380-81.



Cf. American Stevedores, Inc. v. Salzano, 538 F.2d 933 (2nd Cir. 1976).

Moreover, the employer's assertions with respect to retrospective legislation are equally without merit in view of the Supreme Court's decision in Usery v. Turner Elkhorn Mining Co., \_\_\_ U.S. \_\_\_, 49 L. Ed. 752 (1976). In Usery, the Court upheld the constitutionality of a retrospective statute<sup>14/</sup> which required coal mine operators to pay Black Lung Benefits to their employees and survivors, including those who had terminated their employment prior to the enactment of the Act. The Court held:

To be sure, insofar as the Act requires compensation for disabilities bred during employment terminated before the date of enactment, the Act has some retrospective effect - although, as we have noted, the Act imposes no liability on the operators until 1974. And it may be that the liability imposed by the Act for disabilities suffered by former employees was not anticipated at the time of actual employment. But our cases are clear that legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations.

\_\_\_ U.S. \_\_\_, 49 L. Ed. at 766.  
(citations omitted).

Significantly, the Court in Usery likewise upheld the constitutionality of a provision in the Black Lung Act which

<sup>14/</sup> Title IV of the Federal Coal Mine Health and Safety Act of 1969, 83 Stat. 792, as amended by the Black Lung Benefits Act of 1972, 86 Stat. 150, 30 U.S.C. § 901 et seq.



is comparable to amended section 9 of the Longshoremen's Act. Section 411(c)(3) of the Black Lung Act provides death benefits to the statutory survivors if at death the employee was permanently totally disabled due to pneumoconiosis, regardless of the actual cause of death. In this regard the Court held:

In the case of a miner who dies with, but not from, pneumoconiosis before the Act was passed, the benefits serve as deferred compensation for the suffering endured by his dependents by virtue of his illness. And in the case of a miner who died with, but not from, pneumoconiosis after the Act was passed, the benefits serve an additional purpose: the miner's knowledge that his dependent survivors would receive benefits serves to compensate him for the suffering he endures. In short, § 411(c)(3)'s presumption of death due to pneumoconiosis authorizes compensation for injury attributable to the operator's business, and viewed as such it poses no retroactivity problems distinct from those considered in our prior discussion.

It might be suggested that the payment of benefits to dependent survivors is irrational as a scheme of compensation for injury suffered as a result of a miner's disability. But we cannot say that the scheme is wholly unreasonable in providing benefits for those who were most likely to have shared the miner's suffering. Nor can we say that the scheme is arbitrary simply because it spreads the payment of benefits over a period of time.

U.S. \_\_\_, 49 L. Ed. at 772  
(emphasis supplied).

We submit that amended section 9 of the Longshoremen's Act, as with the death benefits provision in the Black Lung Act, is reasonably consonant with the Act's purpose and within Congress' power. A permanent total disability not only imposes a burden on the employee, it destroys his earning capacity, it ultimately affects his ability to provide for his survivors.



Moreover, the ability to prove a causal relationship between the employment injury and death is in many cases difficult. This is particularly true when the compensable disability has lasted for an extended period. And, proof of causality is also difficult to establish when medical and legal concepts are intermixed. That death be inevitable does not obviate these facts nor does it limit or negate Congress' legislative powers to provide death benefits in such cases.

#### CONCLUSION

For the foregoing reasons, it is respectfully submitted that the order of the Benefits Review Board, affirming the applicability of amended section 9 in the instant case, is correct, and further, this provision is constitutional.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Brief for Respondent Director, Office of Workers' Compensation Programs, was served on Paul Gritz, Esq., 185 Montague Street, Brooklyn, New York 11201, Herbert Lasky, Esq., 199 Church Street, New York, New York 10007, Joseph F. Manes, Esq., 11 Park Place, New York, New York 10007, and Peter M. Pryor, Esq., 199 Church Street, New York, New York 10007, by mailing copies thereof to said attorneys by certified mail, postage prepaid, on November 1, 1976.

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